(17)

No. 95-1184

In the

Supreme Court of the United States

October Term, 1995

DANIEL R. GLICKMAN,
SECRETARY OF AGRICULTURE,
Petitioner,

v.

WILEMAN BROS. & ELLIOTT, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

Whether it violates the First Amendment for the Secretary of Agriculture, pursuant to marketing orders issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.*, to require the handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of respondents Wileman Brothers and Elliott, Inc., *et al*. Written permission from all parties to file this brief has been lodged with the Clerk of the Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of participating nationally in litigation matters

affecting the public interest. PLF has over 25,000 supporters nationwide. PLF policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such action only when PLF's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of a brief amicus curiae in this matter. PLF has a long-standing interest in cases which involve issues of compelled speech and association. For example, PLF attorneys were the attorneys of record in *Keller v. State Bar of California*, 496 U.S. 1 (1990), and *Smith v. Regents of University of California*, 4 Cal. 4th 843, *cert. denied*, 510 U.S.___, 114 S. Ct. 181 (1993). PLF also participated as amicus curiae in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), and *Rosenberger v. Rector and Visitors of the University of Virginia*, ___U.S.___, 115 S. Ct. 2510 (1995).

PLF believes that its public policy perspective and litigation experience in support of First Amendment rights will provide a necessary additional viewpoint on the issues presented in this case.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals, finding that the Secretary's generic advertising program violated the First Amendment, is reported at *Wileman Brothers & Elliot, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995).

STATEMENT OF THE CASE

This case pits California peach and nectarine handlers against certain provisions of the Secretary of Agriculture's

marketing orders which govern the advertising of tree fruits. In 1937, Congress passed the Agriculture Marketing Agreement Act (AMAA or Act). The purpose of the AMAA is "to establish and maintain such orderly marketing conditions for agriculture commodities in interstate commerce." 7 U.S.C. § 602(1). Under the Act, the Secretary of Agriculture is authorized to establish marketing orders for fruits and vegetables.

Marketing orders are approved by either two-thirds of the producers of the commodity or the producers of two-thirds of the commodity. 7 U.S.C. § 608c(9)(B). The Secretary's orders are then implemented by committees composed of members of the regulated industry. *Id.* at § 608c(7)(C) and § 10. In 1958, the Secretary promulgated Marketing Order 916, regulating nectarines grown in California. The following year, the Secretary published Marketing Order 917, regulating peaches, pears, and plums grown in California.

Respondents (handlers) grow, pack, and market nectarines and peaches. *Wileman Brothers & Elliot, Inc. v. Espy*, 58 F.3d at 1373. The handlers' business is regulated by the marketing orders governing peaches and nectarines. In addition to establishing quality control standards, these orders charge fruit handlers an assessment which is used to finance a generic advertising program. The assessment imposed on individual fruit handlers is based on the volume of fruit they ship. *Wileman Brothers*, 58 F.3d at 1372. In 1987, handlers began withholding the charged assessments they were required to pay under the marketing orders (approximately 53% of which was used for advertising). *Id.* at 1373-74 n.3. The handlers then challenged the marketing orders by filing a petition with the United States Department of Agriculture (USDA), claiming that the assessments used to fund the advertising programs violated their First

Amendment right to be free from compelled speech.[1] The handlers objected to financing messages with which they disagreed and claimed that their ability to advertise on their own was curtailed by the forced assessments. *Id.* at 1377. The Administrative Law Judge (ALJ) rejected the handlers' First Amendment challenge to the marketing orders. In an unpublished decision, the United States District Court for the Eastern District of California agreed with the ALJ on the First Amendment issues, granted the Secretary's motion for summary judgment, and ordered the handlers to pay $3.1 million in past assessments. On appeal, the Ninth Circuit held that the advertising programs violated the handlers' First Amendment rights. *Wileman Brothers*, 58 F.3d at 1380.

After determining that the challenged assessment imposed a restriction on commercial speech, the Ninth Circuit applied the three-pronged test articulated by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). *Wileman Brothers*, 58 F.3d at 1378. Although agreeing with the Secretary that the promotion of fruit was a substantial governmental interest, the court held that the marketing orders failed to satisfy the second and third prongs of the *Central Hudson* test. *Id.* at 1378-79. The court held that the generic advertising program did not "directly advance" the governmental interest, because there was no evidence to demonstrate that the government promoted the fruit more effectively than would have the individual handlers. *Id.* at 1379. The court also held that the advertising program failed the "narrowly tailored" prong of the *Central Hudson* test, because it did not permit the handlers to opt out of the

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[1] In addition to the First Amendment challenge, the handlers claimed that the orders violated their due process rights, the AMAA, and the Administrative Procedure Act.

program to conduct their own advertising. *Id.* at 1379-80. Thus, the court held that "forced contributions to pay for generic advertising programs contravene the First Amendment rights of the handlers." *Id.* at 1380.

The Secretary of Agriculture petitioned this Court for a Writ of Certiorari. On June 3, 1996, this Court granted the writ. *Glickman v. Wileman Brothers & Elliot, Inc.*, ___U.S.___, 116 S. Ct. 1875 (1996).

SUMMARY OF ARGUMENT

The generic advertising program should be strictly scrutinized. Commercial speech has traditionally been accorded a lesser degree of constitutional protection than other forms of protected speech. The reason for this disparate treatment is the State's interest in protecting consumers from the "commercial harms" of misleading speech or incomplete information. In this case, however, the government is not regulating commercial speech in an attempt to protect the populous from lies and half-truths. Instead, the government is regulating commercial speech in order to extol the many virtues of California peaches and nectarines. Because the government is not attempting to prevent commercial harms, the traditional reasons for according commercial speech less protection are not present, hence, the Secretary's generic advertising program should be evaluated under a stricter standard of review.

The marketing orders challenged in this case infringe on the handlers' freedom not to associate. Unlike its commercial speech jurisprudence, this Court has declined to distinguish between commercial and noncommercial associational rights. Rather, regulations that encroach upon a commercial entity's rights of free association are subject to strict judicial scrutiny.

The advertising program is unconstitutional because it is not the least restrictive means of achieving a compelling state interest. The importance of maintaining a strong national agricultural economy is not debatable. However, the Secretary has failed to show that government advertising is better equipped to achieve this goal than advertising conducted by individual farmers. The obligation to subsidize the government's advertising efforts diminishes the individual handlers' financial ability to pursue their own promotional endeavors. Not only does the Secretary's advertising scheme infringe upon the handlers' rights to disseminate the message of their choice, it adversely affects the First Amendment rights of the consumers by limiting the commercial messages and information available to them.

Finally, the Secretary's goal of endorsing tree fruits could be accomplished through means less restrictive of First Amendment rights. First, the government could implement an advertising program which rewards handlers' individual advertising efforts by reducing the amount of the assessment imposed. Second, the Secretary could simply make the advertising program voluntary.

ARGUMENT

I

THE PEACH AND NECTARINE MARKETING ORDERS ARE UNCONSTITUTIONAL BECAUSE THEY ARE NOT THE LEAST RESTRICTIVE MEANS TO ACHIEVE A COMPELLING STATE INTEREST

The marketing orders at issue in this case implicate two fundamental rights protected by the First Amendment to the

United States Constitution:[2] the rights to be free from compelled speech and association. The importance of these principles has long been recognized. Thomas Jefferson explained that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." I. Brant, *James Madison: The Nationalist*, at 354 (1948), *quoted in Keller v. State Bar*, 496 U.S. at 10, and *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 n.31 (1977). An early observer of our democratic system also noted that the "most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them." A. de Tocqueville, *Democracy in America*, 196 (P. Bradely, ed. 1945). de Tocqueville's careful scrutiny of our constitutional system led him to conclude that the right of association was "almost as inalienable in its nature as the right of personal liberty." *Id.*

Implicit in the First Amendment's guarantees of freedom of speech and association is the freedom to refrain

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[2] The First Amendment provides that "Congress shall make no law respecting an establishment of religion, of prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

from engaging in these activities. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (state cannot compel students to salute the flag); *Wooley v. Maynard*, 430 U.S. 705 (1977) (state cannot compel citizens to display "Live Free or Die" slogan on their license-plates). Moreover, it has been recognized that the government cannot compel a commercial entity to disseminate messages with which it disagrees. *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 17 (1986) (plurality opinion) (striking down utility commission rule requiring a private corporation to distribute a consumer organization's message in its billing envelopes and reaffirming that "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say"). This Court has also acknowledged that the freedom of association protects the right not to associate. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

In light of the historical importance of these rights, and for the reasons that follow, this Court should strictly scrutinize the Secretary's generic advertising program.

A. In Evaluating the Secretary's Marketing Orders This Court Should Apply Strict Judicial Scrutiny

The challenged peach and nectarine marketing orders regulate commercial speech in two ways. First, they force fruit handlers to lend financial support to a message with

which they disagree.[3] Second, by forcing the handlers to subsidize the generic advertising program, the marketing orders infringe upon the handlers' financial ability to conduct their own advertising.[4] Upon characterizing the speech involved in this case as "commercial," there arises a temptation to simply funnel the marketing orders through the familiar three prongs of the *Central Hudson* test to evaluate their constitutionality. However, merely labeling the marketing orders as "commercial speech" does not end the quest for the proper standard of constitutional review; rather it is only the first step. Just last term, three members of this Court explained:

> As our review of the case law reveals, Rhode Island errs in concluding that *all* commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression. The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional

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[3] Specifically, the handlers objected to the advertised messages proclaiming that "red is better" and that "all California fruit is the same." Also, the handlers objected to an assessment financed chart which listed the "Red Jim" nectarine. The rights to this particular variety of nectarine are owned by a member of the Nectarine Administrative Committee. *Wileman Bros.*, 58 F.3d at 1377 n.6.

[4] Some of the handlers were required to contribute in excess of $50,000 a year to underwrite the generic advertising program. The Ninth Circuit reached the unremarkable conclusion that "[t]his is a significant sum of money that could have been used in [the handlers'] own marketing efforts." *Wileman*, 58 F.3d at 1379.

analysis that should apply to decisions to suppress them.

44 Liquormart, Inc. v. Rhode Island, ___U.S.___, 116 S. Ct. 1495, 1507 (1996) (plurality opinion) (emphasis added) (citing *Rubin v. Coors Brewing Co.*, 514 U.S.___, 115 S. Ct. 1585, 1587-88 (1995) (Stevens, J., concurring in judgment). Instead of automatically applying the *Central Hudson* framework to all regulations of speech which propose a commercial transaction, a reviewing court must first determine whether the regulation is designed to prevent misleading speech or protect consumers from the dangers of incomplete information. "It is the State's interest in protecting consumers from 'commercial harms' that provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.'" *44 Liquormart*, 116 U.S. at 1508 (quoting, in part, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993); *see also Rubin v. Coors Brewing Co.*, 115 S. Ct. at 1594 (Stevens, J., concurring) (commercial speech doctrine not applicable because government regulation "neither prevents misleading speech nor protects consumers from the dangers of incomplete information"); *Discovery Network, Inc.*, 113 S. Ct. at 1518 (Blackmun, J., concurring) ("[T]here is no reason to treat truthful commercial speech as a class that is less 'valuable' than noncommercial speech.").

In this case, the Secretary is not attempting to prevent misleading speech or protect consumers from the dangers associated with incomplete commercial information. The Secretary makes no claim--nor is there any evidence to support such a claim--that left to their own devices the handlers would resort to lies, half-truths, or trickery in order to hawk their produce to unsuspecting consumers. Rather, the Secretary attempts to justify its regulation of commercial speech by claiming "that the government has a substantial

interest in enhancing returns to peach and nectarine growers." *Wileman*, 58 F.3d at 1378. Because the regulations at issue in this case were not implemented in order to protect consumers from "commercial harms," the traditional reasons for applying the *Central Hudson* standard of review are not present. Absent the usual justifications for treating commercial speech differently, this Court should evaluate the Secretary's generic advertising program under a more rigorous standard of review than that generally applied to "commercial speech." *44 Liquormart*, 116 S. Ct. at 1508 (holding that a speech ban designed to serve an end unrelated to consumer protection must be reviewed with "special care").

Concluding that the *Central Hudson*, mid-level scrutiny standard of review is inappropriate in a case such as this begs the obvious question; what is the proper standard of review? The answer to this question is found in this Court's freedom of association jurisprudence.

In addition to commercial speech, this case also implicates the freedom of association. The handlers' free speech rights should not be analyzed in isolation, rather they should be evaluated in conjunction with their rights to free association. As with the freedom of speech, the freedom of association "plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. at 623. This Court has held that compelled financial contributions can violate the First Amendment's freedom of association. *Abood v. Detroit Board of Eduction*, 431 U.S. at 234 (holding that union could not use dissenting members' fees for political or ideological causes with which the member disagrees); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 n.9 (1986) (holding that individuals cannot be forced to subsidize union's political speech and emphasizing "that freedom of association, as well as freedom of

expression supported [this] conclusion." (Citing *Abood*, 431 U.S. at 233.)

In *Roberts*, this Court addressed a commercial organization's freedom of association rights. "[T]he Jaycees ... is first and foremost, an organization that, at both the national and local levels, promotes and practices the art of solicitation and management." *Roberts*, 468 U.S. at 639 (O'Connor, J., concurring). In holding that governmental interference with the Jaycees' associational rights could only be justified by a compelling state interest which could not be achieved through less restrictive means, this Court did not delineate between commercial and noncommercial associational rights.[5] Rather, the Court adopted a single standard--strict scrutiny--to evaluate regulations which infringe upon the right to associate, regardless of the "commercial" nature of the association. Based on this Court's holding in *Roberts*, lower courts have held that generic advertising programs that infringe upon associational rights must be measured against strict scrutiny. *United States v. Frame*, 885 F.2d 1119, 1134 (3d Cir. 1989) (Beef Promotion Act subject to strict scrutiny); *see also California Kiwifruit Commission v. Moss*, 96 Daily Journal D.A.R. 5783, 5787 (May 22, 1996) (Opinion of Nicholson, J.)

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[5] *Roberts* did, however, distinguish between "intimate association" and "expressive association." This Court defined intimate association as those relationships "that attend the creation and sustenance of a family" and other "highly personal" relationships. Expressive association, on the other hand, refers to the right of individuals to associate in order to engage "in those activities protected by the First Amendment--speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618. This case involves the latter category.

(kiwifruit assessment subject to strict scrutiny).[6] Based on *Roberts*, this Court should assess the handlers' freedom of association challenges under the most exacting level of scrutiny.

B. The Marketing Orders Are Not The Least Restrictive Means of Achieving a Compelling Governmental Interest

In the court below, the Secretary claimed that the government has an interest "in enhancing returns to peach and nectarine growers." *Wileman Bros.*, 58 F.3d at 1378. While no one would seriously dispute the importance of achieving and maintaining a strong agricultural economy, the Secretary's generic advertising program is necessarily premised on the somewhat arrogant assumption that the government is better able to advertise than are the individual fruit handlers. Not only is this rationale paternalistic, it is also antithetical to our notion of a free-market economy. This Court has repeatedly recognized that "the free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' because it informs the numerous private decisions that drive the system." *Rubin*, 115 S. Ct. at 1589 (quoting, in part,

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[6] The Ninth Circuit found it unnecessary to decide on the proper standard of review to be applied in cases challenging the constitutional propriety of agricultural marketing orders. "The *Frame* majority applied this test [strict scrutiny] to the Beef Promotion Act. However, because we hold the almond marketing program unconstitutional even under the less stringent *Central Hudson* standard, we do not decide which of these two should apply." *Cal-Almond, Inc. v. United States Department of Agriculture*, 14 F.3d 429, 436 (9th Cir. 1993) (citations omitted).

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976)). *Virginia Board of Pharmacy*, the case that first acknowledged that commercial speech is entitled to the protection of the First Amendment, explained that economic realities can make commercial speech more important than political speech. "[A] particular consumer's interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia Board of Pharmacy*, 425 U.S. at 763.

"Generic" advertising of peaches and nectarines is also a misnomer. Although a member of the rose family, a peach by any other name sometimes does not smell as sweet. There are more than 230 varieties of peaches and nectarines marketed in California differing in taste, smell, and color. Many are proprietary varieties grown by a single grower. (Indeed, one of the varieties of nectarines advertised by the "generic" advertising program at issue here was proprietary to one grower who also happened to sit on the marketing board.) There are even cross varieties that combine peaches and nectarines in a single fruit. To advertise, as does the Secretary with the handlers' money, that all California peaches are the same is both untrue and destructive of the efforts of individual efforts of growers and handlers to develop specific varieties of peaches and nectarines to fulfill the demands of the market place.

The Secretary's advertising program actually has the effect of stifling the free flow of commercial information. As the Ninth Circuit recognized, if the individual handlers were not required to subsidize the Secretary's advertising program, they would have more capital to spend on their own individual marketing efforts. *Wileman Brothers.*, 58 F.3d at 1379. At least one of the respondents, Gerawan

Farming Inc., claimed that it would advertise its own label. It is reasonable to assume that other handlers would provide consumers with information regarding the merits of their individual product. Another respondent, Kash, Inc., explained that it found in-store promotions to be an effective means of advertising, and that it would devote more resources to that method if it did not have to support the Secretary's advertising program. *Id.* The Ninth Circuit also came to the indisputable conclusion that "[e]ven if individual handlers were to utilize the same media as used by the generic advertising program, their efforts would undoubtedly differ in the details." *Id.* Simply put, absent the obligation to support the Secretary's advertising campaign financially, the handlers would diversify both the medium and the message of their promotions.

Giving the handlers the financial freedom to increase their own advertising efforts would also serve the First Amendment rights of the consumers.[7] Instead of receiving the simplistic, and by definition "generic," message that "California nectarines are the juiciest," consumers would b provided with information about the many varieties of California peaches and nectarines. Increased information about the products advertised would allow the consumer to make a more informed decision about which product to purchase.

> The commercial market-place, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight

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[7] It has long been recognized that the First Amendment protects not only the right of the advertiser, but also the right of the consumer to receive information. *Virginia State Board of Pharmacy*, 425 U.S. at 757.

> worth. But the general rule is that the speaker and the audience, not the government assess the value of the information presented.

44 Liquormart, 116 S. Ct. at 1508 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). In this case, the government moved beyond merely assessing the information and cast itself in the role of the commercial speaker. By requiring individual fruit handlers to contribute their limited advertising dollars to the funding of this program, the government has necessarily limited the ideas and information that would otherwise be found in the commercial marketplace. Not only does this infringe on the speakers' rights to disseminate their own messages, it also diminishes the amount and variety of information that would otherwise be available to the audience.

Finally, the court below concluded there was no evidence demonstrating that the government's collective advertising was more effective than advertising undertaken by the individual handlers. The First Amendment rights implicated by this case are by no means absolute, however, at the very least, the guarantee of free speech should protect the right of individual business persons to choose the method of advertising best suited to the promotion of their product.

Evidence of less restrictive alternatives to the current peach and nectarine orders is found in similar agricultural marketing orders. For example, the almond marketing order challenged in *Cal-Almond, Inc.*, provided the almond handlers with the option of seeking a credit for advertising efforts they conducted on their own. 7 C.F.R. § 981.41(c)

(1993). 14 F.3d at 433.[8] The peach and nectarine marketing orders, however, have no option which rewards--or even recognizes--the spirit of individualized entrepreneurialism.

There also exists another obvious alternative to the mandatory marketing orders. Instead of extorting assessments from unwilling handlers--in amounts that may exceed $50,000 for a single handler--the Secretary could implement a voluntary advertising program. According to the Secretary, a voluntary, more narrowly tailored program would allow nonpaying handlers to reap the benefits sown by their paying counterparts. *Wileman Brothers*, 58 F.3d at 1380. This assertion lacks a grounding in reality. Although 33 states commercially produce peaches and 28 states handle nectarines, California handlers alone are subject to the compelled assessments. As the Ninth Circuit explained: "If the Secretary is concerned about free-riders, there are already plenty of them in other states." *Wileman*, 58 F.3d at 1380. Without some evidence to show that California fruit handlers are unique in their refusal to pay their own way, the Secretary's "free-rider" justification for compelling assessments simply makes no sense. Because the Secretary's generic advertising program fails to survive strict scrutiny, it should be declared unconstitutional by this Court.

CONCLUSION

Twenty years ago this Court recognized the preeminent role that commercial speech plays in a free market economy:

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[8] Despite this option, the Ninth Circuit concluded that the almond marketing order was not "narrowly tailored" because it failed to recognize certain types of advertising, such as the promotion of a product which also included "competing nuts." *Cal-Almond*, 14 F.3d at 440.

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Virginia Board of Pharmacy, 425 U.S. at 765. By diminishing the handlers' financial ability to advertise, the Secretary's generic program is impeding the free flow of commercial information. In the absence of some evidence to demonstrate that the federal government is better equipped to promote agricultural products than are the growers, distributors, and handlers of those products there is no reason--much less a compelling one--to sustain the Secretary's generic advertising program.

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